

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Raw Bandwidth Communications, Inc.,

Complainant,

vs.

SBC California, Inc. (U-1001-C) and SBC
Advanced Solutions, Inc. (U-6346-C),

Defendants.

Case 03-05-023
(Filed May 15, 2003)

**ADMINISTRATIVE LAW JUDGE'S RULING
GRANTING SBC CALIFORNIA, INC. AND SBC ADVANCED SOLUTIONS,
INC.'S JOINT MOTION TO DISMISS PART OF FIRST AMENDED COMPLAINT**

This ruling grants SBC California, Inc. (SBC California) and SBC Advanced Solutions, Inc.'s (SBC ASI) Joint Motion to Dismiss and to Strike Portions of Raw Bandwidth Communications, Inc.'s (Raw Bandwidth) First Amended Complaint.

Procedural Background

On September 11, 2003, the Assigned Commissioner's ruling (ACR) and scoping memo granted Defendants' motion to dismiss part of Raw Bandwidth's complaint, specifically, the allegation that Defendants unreasonably disconnected Digital Subscriber Line (DSL) Transport whenever Defendants disconnected a customer's voice line service for nonpayment. The ACR noted that the relief Raw Bandwidth requested, advance notice of disconnection, raised privacy concerns.

However, the ACR granted Raw Bandwidth leave to amend the complaint on that issue.

Raw Bandwidth filed its First Amended Complaint on September 22, 2003. The amendment, in relevant part, asks that Raw Bandwidth be directed to request prior authorization from customers to notify the Internet Service Provider (ISP) when voice line service is to be disconnected. On October 23, Defendants filed a joint motion to dismiss Count 6 of the Third Cause of Action and to strike Request for Relief No. 8 of the amended complaint. Complainant opposed the motion in a response filed on November 7, 2003, to which are attached the declarations of Michael Durkin, Raw Bandwidth's CEO, and Lisa Geller, a Director of Raw Bandwidth's client, Community Woodworks.

Factual Background

Raw Bandwidth purchases DSL Transport from SBC ASI under General Terms & Conditions and provides DSL service to its own customers. In order for SBC ASI to provide DSL Transport to Raw Bandwidth, SBC California must provide voice telephone service on that line. When SBC California's voice customer does not pay the telephone bill, SBC California sends a warning notice, terminates voice service if the bill is not paid and leaves DSL Transport connected for five days. Raw Bandwidth states that some disconnect warning notices are sent to the wrong addresses. If the customer still does not pay the voice bill, DSL Transport is disconnected. Defendants use the same procedure to notify all ISPs, including their affiliated ISP SBC Information Services, that DSL Transport has been disconnected.

Discussion

Defendants state that their disconnect procedure is within SBC ASI's General Terms & Conditions and is reasonable. The General Terms & Conditions provides that:

Company's [SBC ASI] DSL Transport is offered via a line sharing arrangement (High Frequency Portion of the Line – HFPL) over an SBC ILEC-provided (non-resold, non-UNE-Platform) retail POTS line. (Section 6.2.2.)

Raw Bandwidth contends that the disconnect procedure is not just and reasonable under Pub. Util. Code §§ 451 and 2896(c).

Under the General Terms & Conditions, a voice line is a condition precedent to offering DSL Transport via line sharing. Once the voice line is disconnected, the line cannot be shared and DSL Transport no longer is offered. Thus, disconnection of DSL Transport when the voice line is disconnected does not appear to violate any law or order of the Commission. However, I decline to dismiss the portion of Raw Bandwidth's First Amended Complaint on that ground. Raw Bandwidth is a customer of SBC ASI and has standing to challenge Defendants' disconnect procedures.

Defendants assert that Raw Bandwidth's newly requested relief (authorization to give advance notice of a customer's disconnection to the customer's ISP) is contrary to the settlement agreement approved by the Commission in Decision (D.) 03-07-032. That settlement precludes SBC California from being able to identify which unaffiliated ISP is the provider. The settlement provides:

ASI has employed system securing enhancements that partition the view for . . . authorized users so that SBC California service representatives, acting on behalf of SBCIS [SBC Information Services] are provided SBCIS-only user Ids, so that such service representatives have an access view that only shows the SBCIS orders.

As a result, customer service representatives addressing disconnection issues do not have access to information about the end-users' ISP. In addition, the settlement agreement shortened migration intervals for customers moving

from one ISP to another, raising the possibility that the proposed disconnection notice would go to the former ISP.

Raw Bandwidth contends that the consent procedure it proposes does not violate the settlement agreement, because there are some SBC California representatives who can access the DSL orders for independent ISPs, including the ISP Support Center representatives, and only representatives acting on behalf of SBCIS cannot. Furthermore, according to Raw Bandwidth, SBC California need not directly notify the ISP but instead could notify SBC ASI and SBC ASI would notify the appropriate ISP.

I conclude that D.03-07-032 does not permit the authorization and notice procedure Raw Bandwidth proposes. Because the personnel responsible for voice disconnection are not ISP Support Center personnel, Defendants' concern is valid. Raw Bandwidth's response and Durkin's declaration fail to provide a basis to disprove Defendants' interpretation of the settlement agreement.

Defendants raise other concerns with customer consent to advance notification of voice disconnection to the ISP. For example, the Commission would not supervise the process because ISPs are unregulated, customers might be coerced, the consent might be too broad, and the information received from the ISP might be untrustworthy. Raw Bandwidth dismisses Defendants' concerns, because Raw Bandwidth's intention only is to preclude customers from losing their DSL service for an extended time. Geller does not oppose advance notification, and Durkin addresses the problems Raw Bandwidth's customers have had with disconnection.

Although Raw Bandwidth has illustrated the difficulties encountered in DSL disconnection after voice service is disconnected, Defendants have shown that the proposed solution, consent to ISP notification, creates further problems. In any event, I conclude that Defendants' failure to implement an advance

notification procedure, as requested by Raw Bandwidth, does not violate statute or Commission order.

Durkin further states that Raw Bandwidth likely will file a future complaint with the Commission that will address Defendants' refusal to negotiate modifications to the DSL Transport contracts and to an additional contract, the ISP Change Procedure contract, which resulted from approval of the settlement agreement in D.03-07-032. The ACR clearly precluded amending the complaint beyond the one issue dismissed.

The Commission is reluctant to dismiss complaints or portions thereof without permitting leave to amend. In this instance, Raw Bandwidth has had two opportunities to request relief consistent with the alleged violation and each time has requested a form of advance notice. Because Raw Bandwidth has conducted discovery and negotiated settlement with Defendants on other issues in the complaint, Raw Bandwidth has had sufficient opportunity to explore the possibilities for advance notice. If leave to amend again were granted, it is unlikely Raw Bandwidth could present another means of advance notice that would survive scrutiny. Since the relief proposed in the amended complaint violates the settlement agreement adopted in D.03-07-032 and Complainant intends to file another complaint addressing Defendants' failure to negotiate modifications to various contracts, Defendants' motion to dismiss is granted. This ruling does not preclude Raw Bandwidth from negotiating revisions to SBC ASI's General Terms & Conditions. The remaining issue in the scoping memo has been briefed; the Commission will issue a draft decision on that issue in the near future.

IT IS RULED that:

1. SBC California, Inc. (SBC California) and SBC Advanced Solutions, Inc.'s (SBC ASI) motion to dismiss Count 6 of the Third Cause of Action of Raw

Bandwidth Communications, Inc.'s (Raw Bandwidth) First Amended Complaint is granted.

2. SBC California and SBC ASI's motion to strike Request for Relief No. 8 of the First Amended Complaint is granted.

Dated December 22, 2003, at San Francisco, California.

/s/ JANICE GRAU

Janice Grau
Presiding Officer and
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by mail, and by electronic mail to the parties to which an electronic mail address has been provided, this day served a true copy of the original attached Administrative Law Judge's Ruling Granting SBC California, Inc. and SBC Advanced Solutions, Inc.'s Joint Motion to Dismiss Part of First Amended Complaint on all parties of record in this proceeding or their attorneys of record.

Dated December 22, 2003, at San Francisco, California.

/s/ KE HUANG

Ke Huang

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to ensure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.